IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-912

EDWARD V. HANRAHAN; RICHARD S. JALOVEC; DANIEL GROTH; RAYMOND BRODERICK; EDWARD CARMODY; JOHN CISZEWSKI; WILLIAM CORBETT; JAMES DAVIS; JOSEPH GORMAN; LYNWOOD HARRIS; ROBERT HUGHES; GEORGE JONES; PHILIP JOSEPH; WILLIAM KELLY; JOHN MARUSICH; JOHN MULCHRONE; HARRY ERVANIAN; JOHN MEADE; ROBERT KUKOWINSKI; and JOHN SADUNAS,

Petitioners,

vs.

IBERIA HAMPTON, Administratrix on behalf of the Estate of FRED A. HAMPTON, Deceased; FANNIE MAE CLARK, Administratrix on behalf of the Estate of MARK CLARK, Deceased; VERLINA BREWER; DEBORAH JOHNSON; RONALD SATCHEL; HAROLD BELL; BLAIR ANDERSON; BRENDA HARRIS; and LOUIS TRUELOCK,

Respondents.

AMICUS CURIAE BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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AMICUS CURIAE BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Fraternal Order of Police of the State of Illinois, consisting of approximately 10,000 police officers, is filing its Amicus Curiae brief on a Petition for Writ of Certiorari of Edward V. Hanrahan et al. v. Iberia Hampton et al. and respectfully prays that a Writ of Certiorari issue to review the order of the United States Court of Appeals for the Seventh Circuit in its cause No. 77-1698.

In its Amicus Curiae brief, the petitioner, Fraternal Order of Police of the State of Illinois, has restricted itself to the single issue of whether Chicago Police Officer Groth should be required to reveal the identity of his informant.

OPINIONS BELOW

On the Petition for Writ of Certiorari as filed by Edward V. Hanrahan et al. v. Iberia Hampton et al., the opinion of the United States Court of Appeals for the Seventh Circuit appears in Appendix A in conjunction with that writ and therefore is not reprinted herein.

The order of the United States Court of Appeals for the Seventh Circuit dated September 12, 1979, denying the Petition for Rehearing in cause No. 77-1698, which, in effect, required Chicago Police Officer Groth to identify his informant is found in Appendix A herein.

JURISDICTION

On April 23, 1979, the judgment of the United States Court of Appeals for the Seventh Circuit was entered with the Honorable Wilbur F. Pell dissenting.

Subsequently, a Petition for Rehearing was filed in conjunction with many issues including the question of whether Chicago Police Officer Groth was required to identify his informant.

In relation to the issue of whether Chicago Police Officer Groth was required to identify the informant, the petitioner, Fraternal Order of Police of the State of Illinois, filed an Amicus Curiae brief in support of a Petition for Rehearing in cause No. 77-1698, Iberia Hampton et al. v. Edward V. Hanrahan et al., which Amicus Curiae brief order was granted by the United States Court of Appeals for the Seventh Circuit on May 25, 1979, and is found in Appendix B herein.

The Petition for Writ of Certiorari was filed within 90 days after the denial of the Petition for Rehearing on September 12, 1979, in cause No. 77-1698, Iberia Hampton v. Edward Hanrahan et al., with reference to various matters including the issue of the identity of the informer and that the petitioner herein has filed a timely motion for an Amicus Curiae brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Whether Chicago Police Officer Groth should be required to reveal the identity of his informant?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On December 4, 1969, at 4:30 A.M., fourteen Chicago Police Officers assigned to the Special Prosecution Unit of the Cook County State's Attorney's Office arrived at an apartment building located at 2337 West Monroe Street, Chicago, Illinois, with a search warrant authorizing the search of the premises for seizure of sawed-off shotguns and other illegal weapons.

During the course of the search and seizure, gunfire resulted with two of the respondents dying and other petitioners and respondents being wounded.

Issuance of the search warrant of the premises was based in part upon information furnished by William O'Neal, a paid informer of the F.B.I., to F.B.I. Special Agent Roy M. Mitchell.

Roy M. Mitchell was not mentioned by name in the Affidavit as prepared by State's Attorney Jalovec for furnishing the information in connection with the issuance of the search warrant, but he was identified as a reliable informant.

That same Affidavit supporting a search of the premises also stated that a reliable informant had informed Police Officer Groth that the apartment of the Black Panthers contained numerous weapons including three sawed-off shotguns.

On the basis of the prepared Affidavit, a warrant was issued for the search of the premises.

During the course of the trial, the Affidavit as prepared by Jalovec pertaining to the information sub-

mitted by F.B.I. Special Agent Mitchell did not create a legal problem as to the identity of the informant as it was discovered that William B. O'Neal furnished the information to F.B.I. Special Agent Mitchell who provided that information to State's Attorney Jalovec which served as a basis for the issuance of the warrant.

However, that portion of the Affidavit relating to the information as secured by Police Officer Groth, on the basis of a reliable informant, was subjected to attack by the respondents on the legal theory that the identity of the informer was required by them in order to secure a fair determination on the merits of the matter.

In the trial of the matter on the question of revealing the identity of the informant, the United States District Court denied the respondents' request for the identity of the informant.

On appeal of this point to the United States Court of Appeals for the Seventh Circuit, the United States Court of Appeals reversed the United States District Court on the basis of the *Roviaro v. United States* decision, 353 U.S. 53 (1957), wherein the United States Court of Appeals, in this instance, determined that balancing the public interest in protecting the flow of information against the individual's right to prepare his defense required disclosure for the benefit of the respondents.

From the April 23, 1979, decision of the United States Court of Appeals for the Seventh Circuit, a Petition for Rehearing was filed, which petition was denied on September 12, 1979.

REASONS FOR GRANTING THE WRIT

In its decision, the United States Court of Appeals for the Seventh Circuit enunciates the legal position that the identity of the informer is to be disclosed as to Groth's portion of the Affidavit on the basis of *Roviaro's* test as stated *in toto* as follows:

> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

In scrutinizing the aforesaid enunciated *Roviaro* test, that portion of the test relating to the consideration of the "crime, the possible defenses, the possible significance of the informer's testimony and other relevant factors" must be considered carefully.

In order to evaluate properly the respondents, excerpts of the Black Panther Party's philosophy toward American society and particularly its policemen are hereby quoted:

> "at once to implement the National Party's analysis and program; America is imperialist and racist; the black community is an imperial colony; the revolutionary struggle of the black colony will be the vanguard of the class struggle; and struggle required the leadership of an armed revolutionary party . . . (and they are) . . . neither a political party with a subordinate military arm nor a partyless military force . . . (but they are) . . . simultaneous-

ly a military and political organization with leaders holding both military and political ranks." *The Black Panther*, May 31, 1969, FDX 37.

"Huey P. Newton—When the people move for liberation, they must have the basic tool of liberation—the gun . . . The blood, sweat, tears and suffering of Black people are the foundation of the wealth and power of the United States of America. We were forced to build America, and if forced to we will tear it down. The immediate result of this destruction will be suffering and bloodshed. But the end result will be perpetual peace for all mankind."

"Hampton—If you kill one pig, you get a little satisfaction, if you kill some more pigs, you get more satisfaction, if you kill all the pigs, you get complete satisfaction."

In terms of the cited Black Panther philosophy, there can be no question that the respondents as Black Panthers espousing this philosophy would be bent upon the overthrow of the existing United States Government.

For the purpose of achieving such a goal, a tyrannical force could only succeed if it could weaken the "police force" of the United States of America which is the guardian of the United States Government and the protector of American society.

To function properly against tyrannical political parties, the police force of this country requires every source at its disposal for information.

Among the most important sources is information supplied by an informer whose identity should not be disclosed and that factor of non-disclosure is in conformity with the *Roviaro* test when that test balances the public interest in protecting the flow of information against the individual's right to prepare his defense. In this instance, the security of the United States is

paramount against tyrannical forces; and, therefore, the public interest requires that the flow of information be protected by non-disclosure of the informant.

The authors of the United States Constitution recognized that the constitutional guarantees as found in the Fifth Amendment of the United States Constitution can be suspended when a *public danger* exists.

In this instance, a *public danger* did exist in that the Black Panther philosophy, as described in this Amicus Curiae brief, unequivocally demands the overthrow of the United States Government.

That an Illinois court has recognized that a public interest related to a public danger can negate the concept of disclosing the identity of an informer is expressed in *People v. Durr*, 28 Ill. 2d 308 (1963).

In *Durr* the court reversed itself from a five to two majority requiring disclosure of the informant to a four to three non-disclosure of the identity of the informant on a Petition for Rehearing.

Because the public interest in Illinois requires the flow of information concerning the existing narcotics problem, the *Durr* court recognized that it had no other alternative but to adopt the view that the non-disclosure of the identity of the informer was essential to protect society against the public danger of a narcotics peddler.

At the same time, the respondents' rights to prepare their defense have not been jeopardized under Illinois law relating to search warrants secured on the basis of information from reliable unidentified informers.

In *McCray v. Illinois*, 386 U.S. 301, the United States Supreme Court held that the *Roviaro* decision pertaining to a particular set of circumstances required the

identity of the informer who was present at the occurrence of the crime and was the only witness other than the accused who could have been involved in the crime; therefore, disclosure of his identity was required for purposes of cross-examination.

Because the respondents seeking disclosure of the identity of the informer did not present evidence that would meet the test of *Roviaro*, the identity of the informer was not required to be revealed as is evidenced by the *McCray* court as follows:

> Indeed, we have repeatedly made clear that federal officers need not disclose an informer's identity in applying for an arrest or search warrant. As was said in *United States v. Ventresca*, 380 U.S. 102, 108, we have "recognized that 'an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,' so long as the magistrate is 'informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved" whose identity need not be disclosed . . . was "credible" or his information "reliable."

Further, the question whether testimony of Groth's informer was significant can be stated in the negative in that the search was valid without Groth's reference in the Affidavit that his information was from a reliable informer, since the Affidavit was supported by information secured by William O'Neal who became an identified informer in the course of these proceedings in the United States District Court. That Mitchell's conveyance of O'Neal's information to Jalovec was hearsay would not destroy the effect of the search warrant according to *McCray v. Illinois* which case holds that an Affidavit may be based upon hearsay information and that the identity of the informer does not require disclosure because of the hearsay content of the information.

Lastly, in a recent United States Supreme Court decision in *Franks v. Delaware*, 438 U.S. 154 (1978), the court supports the *McCray* view that the identity of the informer need not be disclosed when there is ample evidence for the finding of probable cause on the basis of an informer's reliability even though the affiant (police officer in this case) may have falsified a certain portion of his Affidavit in support of a search warrant.

Applying the *Franks* test to Police Officer Groth, *arguendo*, that Groth has misrepresented his portion of the Affidavit, that misrepresentation would not require the disclosure of the informer, since William O'Neal's information was reliable for the issuance of the search warrant.

CONCLUSION

WHEREFORE, petitioner, Fraternal Order of Police of the State of Illinois, prays that this court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 12, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

IBERIA HAMPTON, *et al.*,

Plaintiffs-Appellants,

Nos. 77-1698, 77-1210, and 77-1370

vs.

EDWARD HANRAHAN, *et al.*,

Defendants-Appellees.

On Petition for Rehearing.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by the defendants-appellees, a majority of the panel having voted to deny the petitions; and the *en banc* suggestions having failed to receive a majority of votes of those judges in active service who have not disqualified themselves,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

Judges Pell, Sprecher and Tone voted to grant rehearing *en banc* except as to the shooting policemen.

Judges William J. Bauer and Harlington Wood, Jr. have disqualified themselves from participating in this decision.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 25, 1979.

Before
Hon. LUTHER M. SWYGERT, *Circuit Judge*

IBERIA HAMPTON, *et al.*,
Plaintiffs-Appellants,

No. 77-1698 vs.

EDWARD HANRAHAN, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70-C-1384

JOSEPH SAM PERRY, *Judge*

This matter comes before the court on the "MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF INSTANTER ON BEHALF OF THE FRATERNAL ORDER OF POLICE OF THE STATE OF ILLINOIS IN SUPPORT OF DEFENDANTS-APPELLEES' PETITION FOR REHEARING" filed herein on May 23, 1979. On consideration thereof,

IT IS ORDERED that said motion is hereby GRANTED. The clerk of this court is directed to file herein instanter the fifteen (15) tendered copies of the "AMICUS CURIAE BRIEF ON BEHALF OF THE FRATERNAL ORDER OF POLICE OF THE STATE OF ILLINOIS IN SUPPORT OF THE DEFENDANTS-APPELLEES' PETITION FOR REHEARING (CAUSE NO. 77-1698)."